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2000: Year in Review: A Report to Governors, Chiefs, and Tribal Legislative Representatives by the Maine Indian Tribal-State Commission

Maine Indian Tribal-State Commission

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2000: Year in Review

**A Report to Governors, Chiefs, and
Tribal Legislative Representatives**

by the

Maine Indian Tribal-State Commission

November 22, 2000

With revisions on pages 2 and 12
based on

MITSC discussion of 1/12/01

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Section 1: Introduction

A. Purpose and Organization of This Report

This report reviews the activities, accomplishments, and disappointments of the Maine Indian Tribal-State Commission (MITSC) during the year 2000. After introductory information in Section 1, the report's next five sections describe what happened during the year 2000. Section 2 provides an overview of MITSC's members, meetings, and process; Section 3 reviews key pieces of legislation; Section 4 describes MITSC's education activities; Section 5 summarizes the major natural resources and environmental issues before MITSC; and Section 6 analyses the tribal-state relations process. Based on what has happened during the year 2000, Section 7 identifies proposed areas of focus for the year 2001.

B. 1999 Assembly

The 1999 Assembly of Governors and Chiefs was hosted by the Penobscot Nation at Indian Island on December 3, 1999. The Assembly began with a private session for Governors, Chiefs, and the Passamaquoddy and Penobscot Legislative Representatives. MITSC Chair Cushman D. Anthony also attended as facilitator.

Next, the elected leaders met with MITSC members to hear about the successes and struggles of 1999 in the areas of child welfare and tribal courts, the economic basis of tribal government, education; and natural resources and the environment. There was discussion about the delegation of permitting authority under the federal Clean Water Act's National Pollution Discharge Elimination System (NPDES). There was an update on what happened since the 1998 Assembly on the issue of tribal use of Baxter State Park. Also discussed was legislation submitted by the Houlton Band of Maliseets to change the nature of their Settlement Act to parallel that of the Passamaquoddy Tribe and Penobscot Nation and be part of MITSC.

The issue receiving the most media attention during the 1999 Assembly was the offensive place names bill, sponsored by Passamaquoddy Legislative Representative Donald Soctomah and unanimously supported by MITSC. Other questions by the media related to tribal-state relations in natural resources, economic development, and education.

A major outcome of the 1999 Assembly was agreement that during the year 2000 MITSC should focus on educating non-native people about the Wabanaki. A second outcome was agreement that MITSC should help work out the relationship between the State and the Maliseets. A quiet, yet appreciated outcome was Governor King's helpful response to tribal concerns about Cub Care benefits for tribal members.

Subsequent discussions about the Assembly revealed that:

- ⇒ Governors and Chiefs especially liked the private session and would prefer even more time for this in the future;
- ⇒ The Passamaquoddy and Penobscot Legislative Representatives should continue to be included in the private session for elected leaders;
- ⇒ The portion of the Assembly with MITSC should focus less on reporting about the past year and more on identifying key issues for the coming year; and
- ⇒ Several participants were pleased that the Assembly got good media coverage.

C. Year 2000 High Points and Disappointments

After the upbeat 1999 Assembly, the year 2000 began with hopes of continuing progress in strengthening tribal-state relations. The high point was the enactment of the offensive names legislation (see Section 3.) MITSC also made progress in pulling together people interested in helping to figure out ways of educating non-native people about the Wabanaki (see Section 4.) Another high point, in which MITSC was not involved, was that the Penobscot Nation and the Baxter State Park Authority arrived at an agreement regarding the use of the Park for traditional ceremonies and the Sacred Run over Labor Day weekend (see Section 5.)

The year 2000 also included many major disappointments. These rocked not only MITSC, but also the broader relationship between the State and the Tribes:

- ⇒ First, in spite of MITSC's efforts to help, the Houlton Band of Maliseets, the State, and the City of Houlton did not reach agreement about changing the Settlement Act (see Section 3.)
- ⇒ Second, the Passamaquoddy Tribe and the State did not reach agreement about the status of tribal land in Albany Township. MITSC members disagreed so strongly about actions taken in relation to this matter that one resigned, his replacement has boycotted meetings, and trust among the members has been seriously eroded (see Sections 2, 3, 5, and 6.)
- ⇒ Third, a dispute that has been simmering since before the 1999 Assembly is now on the verge of boiling over. This relates to the State's application to the federal Environmental Protection Agency (EPA) to have delegated permitting authority over tribal waters under the Clean Water Act's National Pollution Discharge Elimination System (see Section 5.) Revision based on MITSC discussion of 1/12/01.

D. 20th Anniversary of the Settlement Act

October marked the 20th anniversary of the Maine Indian Claims Settlement Act. There was no celebration and little recognition of this milestone. Twenty years ago, many people hailed the Act as a fair resolution of a complex case, and many continue to view it as such. However, tribal leaders believe that many unanswered jurisdictional questions remain that are inextricably related to their cultural survival. Today, 20 years after President Jimmy Carter signed the Settlement Act into law, the Tribes and the State strenuously disagree about a host of issues. This is because the Tribes want to be more fully independent, while the State maintains that the Tribes, for the most part, are subject to the same state and federal laws as the rest of Maine.

Section 2: Overview of MITSC

A. MITSC Members and Staff

MITSC has nine members, including four appointed by the State of Maine, two by the Passamaquoddy Tribe, and two by the Penobscot Nation. The ninth member is the Chair, who is selected by the eight appointees. Cushman Anthony has completed two and a half years as MITSC's chairperson. Wayne Newell has represented the Passamaquoddy Tribe at Indian Township (Motahkokmikuk) over the past year. During MITSC's April meeting, Eric Altvater from the Passamaquoddy Tribe at Pleasant Point (Sipayik) resigned in protest to a letter written to the Legislature by MITSC's state members regarding the Albany Township bill. Governor Rick Doyle

replaced him briefly but decided to discontinue his participation. Both Penobscot appointees--John Banks and Mark Chavaree--continued their service as MITSC members. All four state appointees--Alan Brigham, Mike Hastings, Fred Hurley, and Evan Richert--continued, as well. MITSC contracts with Vantage Point for part-time Executive Director services. Diana Scully is completing her 11th year with MITSC in this capacity.

B. MITSC Meetings and Committees

From January through November 2000, MITSC held eight regular meetings throughout the State (Augusta, Indian Island, Indian Township, and Orono.) A quorum was lacking for three meetings. The rate of participation by state and tribal MITSC members was approximately the same. The number of interested persons attending meetings ranged from 5 to 14, with an average of 8. (Several of these interested persons who follow and support MITSC's work on an ongoing basis.) On December 1, 2000, MITSC will meet in Presque Isle as part of the Assembly of Governors, Chiefs, and Tribal Legislative Representatives.

MITSC hosted a sovereignty workshop at the Maine Legislature in February, and participated in Diversity Day at the Legislature in March. MITSC's Education Committee met three times and held a few teleconferences. An ad hoc committee held one meeting to develop the format for a "side-by-side" analysis of major issues that divide the State and the Tribes.

MITSC has four substantive Committees: Economic Basis of Tribal Government; Education; Child Welfare and Tribal Courts; and Natural Resources and Environment. The Education Committee, chaired by Mike Hastings, was the only active Committee over the past year. This is because things have been so contentious between the State and the Tribes, that MITSC decided to place a moratorium on work involving jurisdictional disputes. This put the work of most of MITSC's Committees on hold.

C. MITSC Funding

During fiscal year 2000, MITSC received \$38,150 from the State and \$23,150 from the Tribes (\$11,575 from the Passamaquoddy Tribe and \$11,575 from the Penobscot Nation). The State's contribution included an appropriation of \$15,000, resulting from a bill submitted by Representative Doug Ahearne to provide additional funding to MITSC. Because this bill passed as a one-time biennial appropriation, the \$15,000 will not continue past June 30, 2001, unless it is appropriated on a permanent basis.

D. MITSC's Operating Procedures

During its March meeting, MITSC talked about its "modus operandi." The Chair reviewed that, in the past, MITSC had agreed that:

- ⇒ It would like to have interested persons participate in MITSC's meetings, so long as they contribute to agenda items.
- ⇒ Agenda items need to come from either MITSC members or the governments represented on MITSC.
- ⇒ There are issues that come to MITSC through committees, which include interested persons, and it is fine for their ideas to come forward as part of committee reports.

Several MITSC members commented that allowing others to participate in MITSC's process has a chilling effect and does not help the State and the Tribes solve

problems. They view MITSC as a board for one sovereign to deal with another sovereign, not as a board for gathering public comment.

After extensive discussion, MITSC members reached the following agreements:

- ⇒ MITSC allows comments by other interested persons in its meetings as a courtesy. When discussing each agenda item, MITSC members will speak first to frame and discuss the issues, then others will be allowed to make relevant comments, and finally MITSC members will talk again and take action.
- ⇒ MITSC members may table any agenda item at any time.
- ⇒ Only MITSC members may place items on MITSC's agenda.
- ⇒ It was agreed by a vote of six in favor, two against, and one abstention that MITSC will list its meetings in the Legislative Calendar and include when and where it will take place, as well as MITSC's phone number and the name of the Executive Director as the contact person.
- ⇒ MITSC's bylaws should include provisions for executive sessions.

E. More Fundamental Concerns about MITSC

Meeting minutes for the year 2000 reflect that least half the time during regular meetings was devoted to the expression of concerns and soul searching about what the process has been, whether MITSC should continue to exist, whether and how it should be reinvented, and what other tribal-state processes need to be in place beyond MITSC. Section 6 delves into these areas in some detail.

Section 3: Year 2000 at the Legislature

A. Maliseet Legislation (LD 2178)

In 1999, during the First Regular Session of the 119th Legislature, Representative Roger Sherman sponsored LD 2178, a concept bill to amend the Implementing Act concerning the Houlton Band of Maliseet Indians. MITSC members noted that a major difference between the proposal and the Maine Indian Claims Settlement Act was that, unlike the Passamaquoddy Tribe and Penobscot Nation, the Houlton Band would not have to get municipal approval for land to be placed in trust. MITSC also expressed support for having the Maliseets become members of the Commission on the same or similar terms as the Passamaquoddies and the Penobscots. The Legislature decided to hold over the bill until the Second Regular Session.

In December 1999, as part of its effort to help secure the bill's eventual passage, both the Commission's Chair and Executive Director participated in a meeting involving tribal and state representatives, which was organized by the Houlton Band to flesh out the concept bill. During its January 2000 meeting, MITSC voted to support the Maliseets' draft of LD 2178, based on the understanding that the Houlton Band would be treated on the same basis as the Passamaquoddy Tribe and the Penobscot Nation. With one state MITSC member and one tribal MITSC member absent, that motion passed by a vote of five members in favor and two members abstaining. MITSC also voted in unanimous support of the addition of four seats to MITSC--two for the Maliseets and two more for the State.

In testimony on LD 2178 before the Judiciary Committee in January 2000, MITSC pointed out that there were still significant differences between what the Maliseets were seeking and what the State would support with regard to the bill. A major area of disagreement was whether the Houlton Band should sign a separate agreement stating that they are subject to the State's environmental laws. The State said it wanted to know what it would be agreeing to, but the Houlton Band said it should not be the only Tribe required to enter into a side agreement, especially when a number of areas in the agreement were under litigation.

The Judiciary Committee decided to give the parties more time to work on a compromise draft of LD 2178. In February 2000, MITSC facilitated meetings in Houlton and Bangor so tribal, state, and local officials could try to reach agreement. There were four major issues: the conversion of an existing 807 acres of trust land in Houlton and Littleton into Indian Territory; the process to use in the acquisition of additional lands to be included in Indian Territory; sustenance fishing rights on the river flowing through Maliseet land; and the exclusion of beano on the 807 acres.

The general purpose of LD 2178 was to bring the Houlton Band into the Settlement Act on the same terms as the other two Tribes. However, during the negotiations, it became clear that, due to the location of Maliseet trust lands exclusively within the boundaries of organized municipalities, they could not become Indian Territory on same terms as lands added to Passamaquoddy and Penobscot Indian Territory (i.e. submitting to the permission of the legislative body of the organized municipality) and gain the desired status. Much of the discussion focused on figuring out how to get around this problem, but it was not possible to gain agreement from all the parties. During the negotiations, the State and the Maliseets came close to consensus, but the Maliseets and Houlton were far from consensus.

The idea of having a legislatively established commission try to resolve the issues, was under consideration for a short time. The Maliseets and MITSC both supported this idea. However, in the end, the Legislature simply killed LD 2178 without creating an ongoing mechanism to continue work on the issues raised by the bill. The defeat of this legislation was a tremendous disappointment for the Houlton Band of Maliseet Indians. During the year 2000, this was one of the issues that seriously damaged tribal-state relations.

B. Offensive Names Legislation (LD 2418)

Passamaquoddy Legislative Representative Donald Soctomah introduced LD 2418 on behalf of MITSC to prohibit the use of the word "squaw" in place names in Maine. MITSC prepared a summary of issues and views about this issue that the Legislature used extensively in its discussions about this bill.

MITSC's research revealed that there were twenty-five known geographic features in seven counties with the word "squaw" or "squa." MITSC found that consistent with the dictionary definitions of "squaw", there is a high degree of consensus (though not 100%) that the word has a derogatory meaning today.

The January 2000 hearing on LD 2418 before the Judiciary Committee was dramatic. Scores of Wabanaki women--Maliseet, Micmac, Passamaquoddy, and Penobscot--came to Augusta from all parts of Maine to speak from their hearts about how much the word "sq--" has hurt them. There were young girls, elders, and women of all ages in between. Joining them were many Wabanaki men, as well as members of other Tribes. It was not just native people who came to ask the Legislature to drop "sq--" from place names. Representatives of the Catholic Diocese of Maine, Committee on

Indian Relations of the Episcopal Diocese of Maine, Friends Committee on Maine Public Policy, Maine AFL-CIO, Maine Council of Churches, Maine Human Rights Commission, Maine Lesbian Gay Political Alliance, Maine Women's Lobby, and National Coalition Building Institute all came to testify in support of LD 2418.

All five tribal governments in Maine passed resolutions in support of LD 2418, as has United South and Eastern Tribes, an inter-tribal organization consisting of 23 federally recognized tribes. Other supporters included Governor King, the NAACP, the Maine Holocaust Human Rights Center, and former Representative Jerry Talbot, the first African-American person to serve in the Maine Legislature. During the mid-1970s, Representative Talbot introduced and successfully fought for enactment of legislation to drop the "N" word from place names in Maine.

After the hearing on LD 2418, the vote out of committee was 12 to 1 to endorse the bill, as amended. The changes were friendly, technical amendments. The Legislature passed LD 2481 by an overwhelming margin as PL 1999, c. 613. This success was MITSC's high point for the year 2000.

C. Penobscot Deadline Legislation (LD 2499)

In January 2000, the Penobscot Legislative Representative Donna Loring asked MITSC to support legislation to extend the deadline for acquiring 150,000 acres of Indian Territory under the Maine Indian Claims Settlement Act by 20 years. This had been extended at least two times before. MITSC unanimously supported this legislation.

The February hearing before the Judiciary Committee on LD 2499, Representative Loring's bill, went quite well. MITSC testified that 30 MRSA §6205(2) allows the Penobscot Nation to acquire 150,000 acres in Indian Territory by January 2001, but that only around 55,000 acres have been included so far. MITSC stated its support for extending the deadline by 20 years. The Judiciary Committee unanimously supported LD 2499. It easily passed the Legislature and was enacted into law as PL 1997, c. 625.

D. Albany Township Legislation (LD 2607) See also Section 6-C.

In sharp contrast to LD 2499 relating to Penobscot Indian Territory, which sailed through MITSC and the Legislature, LD 2607 (An Act Concerning Previous Passamaquoddy Indian Territory Legislation) was extremely controversial.

On February 7, 2000, the Law Court issued a decision in Kimball v. LURC regarding a parcel of land in Albany Township previously considered to be part of Passamaquoddy Indian Territory. During MITSC's February meeting, Passamaquoddy Legislative Representative Donald Soctomah reported that the judge said there is an error in the statute that affects the status of this parcel. He sponsored LD 2607 to correct the error. The judge said the parcel is not in Indian Territory because even though it was added to the list of lands that may be placed in trust, it was not in fact placed in trust until after the deadline specified in the statute.

Opponents of LD 2607 argued that in 1992 there was no consideration of the Albany Township parcel as an island within another area, and noted that the parcel was understood to be a farm or a place for troubled youth. Interested persons from Albany Township indicated that months later, when there were news articles saying the Passamaquoddy Tribe had an interest in gambling, they began to worry that the intended use was incompatible with the nature of the surrounding area.

Supporters of LD 2607 reviewed that during the 1980s, the Attorney General told MITSC that there are two ways to approve land, and one way does not have a deadline. They noted that approving LD 2081 back in 1992 involved both state and tribal laws. They expressed strong concern that private litigants got the state court to rule that this bilateral process is invalid. In their view, this undermined the integrity of the process the Legislature and Tribes went through in 1992, as well as the integrity of Settlement Act as a whole.

MITSC minutes indicate that on January 22, 1991, MITSC voted unanimously "to support legislation to add the farm in Albany Township owned by the Passama-quoddy Tribe to the list of territory that can be held in trust for the Tribe." Then on December 17, 1991, MITSC voted unanimously "to reaffirm its support of legislation proposed by the Passamaquoddy Tribe to place into trust the small farm in Albany Township." MITSC did not provide public notice about the proposal to place the Albany Township parcel in trust. On February 4, 1992, MITSC presented testimony to the Judiciary Committee in support of LD 2081, the bill to add this land to Indian Territory. The Legislature passed the bill during that Session, and it was enacted as PL 1991, c. 720.

During its March 2000 meeting, MITSC discussed what action it ought to take on LD 2607. Several MITSC members believed that the actions taken in 1991 and 1992 were sufficient, and MITSC did not need to undertake a full review of the matter again. Other members believed that MITSC needed to go through its review process anew, including public notice, because they felt that LD 2607 was as a new proposal. With one state member absent, MITSC's vote on LD 2607 was five in favor (four tribal members and the chair) and three against (three state members.) Those who voted against the motion to support the bill clarified that they did so because they felt the public notice provisions of MITSC's bylaws should be applied to this before taking action, and there was not enough time to undertake that review process prior the March 15, 2000 hearing on the bill. It was agreed that MITSC would present a letter in support of LD 2607 during the hearing. (See Attachment i.)

In a separate letter written to the Judiciary Committee, MITSC's state members directly presented their concerns. (See Attachment ii.) As described in Section 6-A, MITSC's tribal members felt betrayed by this action by their state colleagues. In the end, the Legislature killed LD 2607.

E. Sovereignty Workshop

On February 15, 2000 MITSC sponsored a lunch-time workshop on tribal sovereignty at the Legislature. The workshop was presented from the tribal perspective so legislators could gain a fuller understanding of this complex issue and can see that there is a reasonable, legitimate basis for differences in views. The workshop was a factual, educational session—not a confrontational debate.

The featured speaker was Jill Shibbles, Esq., a member of the Penobscot Nation. At that time, Ms. Shibbles was the Chief Judge of the Mashantucket Pequot Tribal Court in Connecticut, the Appellate Judge of the Passamaquoddy Tribal Appellate Court, and the First Vice President of the National American Indian Court Judges Association. (Recently, Ms. Shibbles moved to Colorado to be the new Executive Director of the National Tribal Justice Resource Center.) Seven legislators cosponsored the workshop, and twenty-six legislators and two legislative staff members attended the workshop.

F. Diversity Day

At the request of Passamaquoddy Legislative Representative Donald Soctomah and House Assistant Minority Leader Richard Campbell, MITSC cosponsored Diversity Day at the Legislature on March 22, 2000. Also participating in the event were Maine people of Wabanaki, African American, French, and Greek heritage.

Section 4: Education

A. Mandate from 1999 Assembly; People Recruited

A major outcome of the 1999 Assembly was agreement that MITSC should be involved in educating non-Native people about the Wabanaki. MITSC began with the two activities at the Legislature described above--the sovereignty workshop and Diversity Day. Because MITSC realized that it cannot carry out this mandate alone, it has identified 40 people, including both Wabanaki and non-Wabanaki, who might be able to help out.

B. Education Committee Work and Work Plan

During meetings in April, June, and August 2000, the Education Committee did an informal inventory of existing educational resources, identified gaps and needs, and discussed what should be in a work plan. Participants identified a number of existing efforts to educate non-native people about the Wabanaki:

- ⇒ Several Wabanaki people visit schools to teach children about their people and culture. Some address the specific issues of racism and mascots.
 - ⇒ A Penobscot elder has developed a training session about Wabanaki traditions and tribal protocols for public agencies.
 - ⇒ The Wabanaki Center and Native American Studies Program at the University of Maine have organized a group of Wabanaki people to determine what is taught about them.
 - ⇒ The Abbe Museum in Bar Harbor has exhibits about the Wabanaki people and an archaeology field school. A new museum is scheduled to open in 2001 and they are planning to hire an educator.
 - ⇒ In 1989, the American Friends Service Committee published a curriculum, developed by representatives of all the Tribes, entitled "Wabanakis of Maine and the Maritimes." A revision soon will be published.
 - ⇒ Old Fort Western in Augusta focuses on the past and how this impacts life today. They have a program about Maine Indians in the 18th Century, but have had a difficult time getting information about Indians.
 - ⇒ The Maine Indian Basketmakers Alliance does four shows a year. They sell baskets and educate the thousands of people who come through.
 - ⇒ The Episcopal Diocese is working on a film about racism.
- Participants also identified a number of gaps in the education of non-native people about the Wabanaki:
- ⇒ Wabanaki people often are not directly involved in education, and they must be because non-native people do not know how to teach about the Wabanaki.
 - ⇒ Funding is needed to pay for Wabanaki educators to teach non-native people.
 - ⇒ Education needs to involve film, not just things in writing.

- ⇒ There is a need to say the truth about racism and power in Maine.
- ⇒ The facts of history relating to the Wabanaki and the encounter with Europeans must be brought back to consciousness.
- ⇒ There is a need for a clearinghouse to help schools and community groups find speakers.
- ⇒ There needs to be a plan about how people will be educated and how this will be funded.

In discussions about what the priorities should be, the Education Committee identified the following:

- ⇒ Require the public school curriculum and learning results to include the Wabanakis.
- ⇒ Gather curriculum materials for teachers through annual conferences, which can be used during teacher workshops and in-service days.
- ⇒ Hold a Wabanaki Day (or week) with activities throughout the State.
- ⇒ Develop interactive experiences involving children of different cultural backgrounds.
- ⇒ Identify and raise funding to support Wabanaki speakers for public schools and community organizations.
- ⇒ Have an educational effort for adults through churches, museums, civic groups, and public libraries.

A key part of the Committee's discussions was the need to have native leadership in these educational initiatives, because native perspectives flow from this. It was agreed that non-native support is essential, too, because there is so much to be done. Another idea was establishing a clearinghouse and/or a newsletter to coordinate and share information. It also was suggested that MITSC's primary role could be to help generate resources for these initiatives.

During its October 2000 meeting, MITSC discussed and accepted a draft education work plan, which is included in Attachment iii. It is organized into three categories: school-, government-, and community-focused initiatives. Members of the Education Committee are reviewing the draft work plan to determine what is missing, what is not clear, if there is anything with which they disagree, how they can be involved, and if there are others who should be involved. MITSC also would like to know whether the Governors, Chiefs, and Tribal Representatives support the direction and initiatives in the draft work plan.

C. Use of Offensive Terms

An issue brought to MITSC's attention during its meeting of March 2000 was the offensive use of the word "sq---" by KISS 94.5 radio station in relation to the newly minted dollar coin. Several people described how the incident had traumatized native women. One suggestion was that MITSC write a letter to the radio station, Maine Human Rights Commission, Attorney General, and Federal Communications Commission condemning this incident. Other suggestions were for MITSC to issue a press release, to ask the Legislature for a memorial that condemns the use of offensive names over the public's airways and in public discourse, and/or to have a public discussion on the air about this.

The outcomes of MITSC's discussion were to urge the Legislature to issue a joint resolution and to have individual MITSC members write letters to the radio station. The Legislature later enacted a "Joint Resolution Declaring 2000 the Year of the Native American Woman," which was sponsored by Penobscot Legislative Representative Donna Loring.

MITSC is pleased that during the year 2000 the editor of the Portland Press Herald and Maine Sunday Telegram announced a new policy not to use the word "sq--" or refer to Indian-related mascots in their reporting. This is an extremely positive step, and MITSC hopes that their leadership will influence other media to take the same action in the months to come.

D. Use of Offensive Mascots

During the year 2000 MITSC was not formally involved in the issue of mascots that use Native American images and themes. However, on an informal basis, MITSC helped to link school districts and concerned parents with possible Wabanaki speakers regarding this issue. The Scarborough School District's recent decision to drop "Redskins" as their name and mascot is very positive step in the right direction. MITSC hopes that more schools will follow their example in the coming year.

E. Archives and Website

MITSC has made a financial commitment of \$1,000 to help establish a Maine Indian Claims Settlement Archives. One of MITSC's members has been working closely with the University of Maine and has identified a well qualified graduate student to gather and organize the material for the archives. MITSC also has set aside \$4,000 for the development of a MITSC Website. MITSC has begun to explore the possibilities of collaboration (e.g. with the Wabanaki Center) and to identify possible individuals and firms to create the Website.

Section 5: Natural Resources and Environment

A. National Pollution Discharge Elimination System Dispute

As indicated in Section 1-C, one of the most divisive issues between the State and the Tribes during the year 2000 has been the National Pollution Discharge Elimination System (NPDES) delegation process. Delegation is a federal process under the Environmental Protection Agency (EPA) that authorizes States to administer major program elements of the federal Clean Water Act.

During the 1999 Assembly, it was noted that the Tribes and the State are on a collision course with regard to the environment. Tribal leaders were concerned that the State had applied to EPA to handle pollution discharges and stated that the Tribes have no jurisdiction over any waters. They also expressed concern that while EPA and the Tribes were willing to meet to discuss this, the State was not.

In January 2000 MITSC hosted a meeting to discuss NPDES. Participants (representatives of the Maine Department of Environmental Protection, MITSC, and others) identified three areas of dispute:

- ⇒ The Tribes believe that the Federal Government has a trust responsibility. The State disagrees.
- ⇒ The Penobscots believe they own all the Penobscot River from Indian Island north, including the branches and the tributaries. The State disputes this. There are similar issues for the Passamaquoddy Tribe and the Maliseets.
- ⇒ The Tribes believe that sustenance fishing rights should mean the ability to catch and consume fish in tribal waters without fear of adverse health impacts, which is another reason the State should not take jurisdiction over tribal waters. The State disagrees. Revision based on 1/12/01 MITSC meeting.

MITSC learned that the Attorney General had declined to participate in mediated discussion of this issue. It was agreed that MITSC would request a meeting with the Attorney General to explore issues relating to NPDES. When MITSC's Chair sent a letter about this, the Attorney General responded that it would be better for someone else from his office to be involved in the meeting. During its February 2000 meeting, MITSC decided that it had done what it could and should drop this issue for the time being.

Several months later, during MITSC's October meeting, the Chair noted that two sides were preparing for battle and asked whether there is a further role for MITSC in the NPDES delegation issue. It was agreed that MITSC should write a letter to ask if there is willingness to engage in facilitated discussion and that the letter should go to Governor King, all Tribal Governors and Chiefs, the Attorney General, and EPA's Region I Administrator. It was noted that an agreement in this area cannot work unless the Tribes and the State acknowledge each other's positions and both positions are given equal weight.

The letter from MITSC's Chair is included as Attachment iv. Here are some excerpts from it:

At the last meeting of [MITSC], we noted with chagrin the continuing dispute between the State of Maine and the Tribes regarding the proposed delegation of NPDES permitting authority to the State. We observed that this conflict appears to be consuming a great deal of time, attention, and

financial resources, and is increasing the discomfort and mistrust between the Tribes and the State...

It is clear to us that a major problem exists that needs to be resolved in some fashion...We believe...that resolving that problem through facilitated negotiations would involve far less damage to the relationships between the Tribes and the State, and at lower cost, than would happen through litigation.

B. Freedom of Access Act Court Case

Part of the NPDES dispute is a major argument over whether the State's Freedom of Access Act (FOAA) applies to the Tribes. On November 9, 2000, a Superior Court Judge ruled that by November 13 three Tribal Governors must either turn over tribal documents requested by paper companies, appeal his decision, or go to jail. The Governors reluctantly decided to appeal the decision.

There was extensive discussion about this case during MITSC's November 14 meeting. Several MITSC members commented that they never imagined that a state court would sentence Tribal Governors to jail. Several stated that documents generated by the Tribes are the business of the Tribes and are not subject to the FOAA. MITSC members agreed that MITSC should gather more information about the positions of the Tribes, the State, and the paper companies and should prepare a draft letter expressing MITSC's views about the issues raised by the case. MITSC members will discuss the draft letter at their meeting of December 1, 2000.

C. Tribal Use of Baxter State Park

During the 1999 Assembly, there was an update on the use of Baxter State Park for the annual Sacred Run to Katahdin. Penobscot participants explained that they had been making progress with the Baxter State Authority in discussions about the exemption of fees and a special ceremonial place in the Park for the Sacred Run. However, after receiving an opinion from the Attorney General's office, the Baxter State Park Authority refused to do anything, saying that if they do it for the Penobscots they must do it for everyone else.

MITSC discussed this issue during their January and February meetings. Under consideration was whether MITSC should help facilitate a workshop for the Baxter State Authority and their Advisory Committee about the cultural and spiritual issues involved with Katahdin. Some felt that for MITSC to be involved, both parties must invite MITSC. The Penobscots participating in the discussion responded by indicating that they would handle the educational session without MITSC's help.

On October 20, 2000, after two years of discussion, the Baxter State Park Authority approved a agreement with the Wabanakis. There is an area on West Branch lands for vision quests and tobacco offering ceremonies, and Katahdin Stream Campground will continue to be available over Labor Day weekend for the Sacred Run.

D. Use of Land in Indian Territory See also Section 3-D

At the heart of the controversy about Albany Township was the intended use of the land by the Tribe. During MITSC's October meeting, there was discussion about a provision in MITSC's bylaws relating to the use of the land:

The Commission shall not consider issues raised regarding the restrictions on the use of lands which any landowner, Indian or non-Indian, could implement.

MITSC is not supposed to consider land use if anyone else can do the same thing on that land. Any legal use of the land is acceptable, so long as it can be used this way by any citizen--native or non-native. One of MITSC's members recalled that the biggest concern in the early days after the Settlement was that the Tribes would post their land, and this is why this provision is in the bylaws.

MITSC never has used any formal criteria in its review of potential lands to be added to Indian Territory. Most parcels that have come before MITSC have been similar to the lands on the original lists in the Settlement Act--remote, uninhabited parcels in unorganized territory. MITSC simply has made determinations based on comments it received.

In the early days after the Settlement, MITSC did not encounter lands in unorganized territory that were on the periphery of settled areas. In contrast, the Passamaquoddy Tribe's land in Albany Township is a small parcel in the midst of a settled community. Some MITSC members are concerned about having a small parcel of Indian Territory in the middle of something else. In organized areas, the municipal officials must approve the addition of tribal-owned lands to Indian Territory. Albany Township did not have this opportunity because it is not organized.

MITSC members agree that MITSC cannot anticipate everything and does not need formal criteria for considering the addition of land to Indian Territory. They also agree that central to the Settlement Act is the re-acquisition of a land base by the Passamaquoddy Tribe and the Penobscot Nation (150,000 acres each) that is of benefit to them--not just for hunting and fishing, but also for economic development.

E. MITSC Fishing Rules

In 1999 the Penobscot Nation asked MITSC to develop rules to license commercial fishing on waters under its jurisdiction. The rule development process has been delayed because other issues commanded MITSC's attention during the past year. MITSC plans to tackle these rules during 2001. Commercial licensing would involve eels, bait dealers, mussels, commercial fishing of alewives, and other activities. Licensing would be a new level of operational responsibilities for MITSC.

Section 6: Tribal-State Relations Process

A. MITSC's Most Dramatic Meeting

On April 28, 2000, MITSC never got past opening announcements on its agenda. Passamaquoddy MITSC member William "Eric" Altvater read a letter announcing his resignation in protest of another letter sent to the Judiciary Committee by MITSC's state members regarding LD 2607 (Albany Township.) Penobscot MITSC member John Banks, Passamaquoddy Legislative Representative Donald Soctomah, and several other tribal members also left the meeting. In his letter, Mr. Altvater explained his resignation:

In a letter signed by the State members of MITSC and sent to the Judiciary Committee, the State members said that the case of Kimball v. LURC invalidated the steps previously taken by the State to include certain land within Albany Township into Indian Territory. As a direct result of this letter, the Senate voted down the bill that would have completed the steps necessary to make 18.3 acres in Albany Passamaquoddy Territory...I was always under the impression that MITSC acted as a body. For the State members of MITSC to take action in their collective, that was so obviously detrimental to the interests of the Passamaquoddy Tribe, is more than I can personally, morally, and ethically accept...

Representative Soctomah also read a statement before he left:

What good is this Commission if the vote of the Tribal MITSC members is not even considered? I have lost faith with the process; that is not an easy statement to make because I believe open and honest communication will solve any and all problems. This was a major step backwards in trust and relations between the Tribe and MITSC.

State MITSC members recalled that this was not the first time members spoke out against a view expressed by MITSC. For example, MITSC spent a lot of time on land use, and then Tribal Representatives at the Legislature killed it. State MITSC members indicated that they signed the letter because there was not time for MITSC to go through its process, not because they opposed the use of the land. Some argued that expressing minority views is part of the democratic process. Subsequent to this meeting, MITSC's state members wrote a letter of apology to the Passamaquoddy Tribe. However, the trust among MITSC members remains frayed.

B. Should MITSC Continue?

In the wake of this difficult meeting, the question of whether MITSC should continue arose. It was noted that the Tribes' MITSC members represent what they think is best for Tribes and the State's MITSC members represent what they think is best for the State, and sometimes this is not easy to do. One of MITSC's state members commented that if MITSC's charge is to implement the Maine Indian Claims Settlement Act and half of MITSC does not believe in it, then maybe MITSC needs to dissolve. Similarly, one of MITSC's tribal members stated that MITSC members are at loggerheads, and he does not see any future for MITSC. An interested observer pointed out that even if people stop going to MITSC, it still would exist in the Settlement Act until or unless state and tribal governments repeal it.

MITSC members explored what would happen if there were no MITSC:

- ⇒ The State and Tribes would lose an effective mechanism for working together at the technical level (e.g. fisheries management and enforcement.)
- ⇒ The capital area's only informal information and referral mechanism for information about Maine's Tribes would disappear.
- ⇒ MITSC would not be available to help generate support for initiatives to educate non-native people about the Wabanaki.

C. MITSC Is a Piece of a Puzzle

Another line of thinking was that MITSC is a piece of a puzzle, and more pieces are needed in the executive and legislative branches to complete the puzzle. One MITSC member stated perhaps MITSC can survive if people change their expectations about what it can do. He felt that people need to realize and accept that certain issues are not going to be dealt with at MITSC. MITSC members agree that MITSC needs to push issues to higher levels and people at higher levels need to stop dumping issues on MITSC with the hope that they will go away.

MITSC members also agree that the Legislature must become more intensively involved in tribal-state policy discussions. The Legislature often considers MITSC to be a legislative subcommittee or a lightning rod. The Legislature often refers complex, emotional tribal-state issues to MITSC rather than dealing with them directly. Removing these issues from the State House is unfortunate, because more legislators need to be knowledgeable about tribal-state relations. No one in the Legislature has

the responsibility to look at the whole picture of tribal-state relations, and the existence of MITSC seems to perpetuate this lack of focus.

D. Where to Go From Here?

A number of excellent ideas have emerged from the conflict and soul searching resulting from the falling out over LD 2607:

- ⇒ MITSC should bring together and facilitate meetings of other higher level policy makers to address issues that MITSC cannot deal with effectively.
- ⇒ MITSC should be connected with Tribal Councils and the Legislature in more formal ways. In addition to the Assembly of Governors and Chiefs, there should be a Legislative Assembly involving Legislators and Tribal Council members.
- ⇒ The Legislature should have a formal mechanism for dealing with tribal and tribal-state issues.
- ⇒ The Executive Branch should have a cabinet or sub-cabinet level tribal-state policy group that includes members from across State Government. A structure and periodic meetings are needed.
- ⇒ Something like MITSC is needed for day-to-day technical issues and there also needs to be a process institutionalized at the policy level.
- ⇒ MITSC should submit a bill to the Legislature to appoint a study commission to come up with a restructuring of the tribal-state relations process.
- ⇒ There should be a close examination of racism and how it may affect views of sovereignty.

E. Side-by-Side Analysis

MITSC members all are acutely aware that the Tribes and the State have fundamentally different views about the Settlement Act. There is enough ambiguity in the Settlement Act that both sides have been able come out with their own views. Until the Act is more clearly understood by more people, it will be difficult to move in a direction other than letting the courts decide.

Over the summer, MITSC members discussed whether they should analyze key areas of disagreement between the State and the Tribes. The completed analysis would go to key state and tribal lawmakers and policy-makers, who would have to understand these areas and come up with answers. In July an ad hoc committee of MITSC Chair Cushman Anthony, Penobscot MITSC member Mark Chavaree, and Bill Stokes of the Department of Attorney General met to identify what issues need to be analyzed. Attachment v includes their preliminary list.

During MITSC's October 2000 meeting, it was suggested that MITSC should move forward on the side-by-side analysis of core differences between the State and the Tribes, after a vote and memorialization that the analysis will not be used against any party in litigation. It also was suggested that for each issue the analysis should look at what the words say, the legal rationale, the cultural rationale, fears and concerns, and whether/where there is room for movement.

Section 7: Proposed Areas of Focus for Year 2001

A. Passamaquoddy Land Legislation

On November 14, 2000, Passamaquoddy Legislative Representative Donald Soctomah asked MITSC to begin its process to review the addition of land owned by the Passamaquoddy Tribe in Washington County to Indian Territory. MITSC voted unanimously that upon receipt of certification by the Tribe that it has approved this action, MITSC will place a legal advertisement and take other steps in accordance with its bylaws to receive public comment before it makes a recommendation regarding the addition of this land to Indian Territory.

B. MITSC's Role; Analysis of Core Differences

The State and the Tribes need to decide what role they want MITSC to play in the future. MITSC needs to know what action the Governors and Chiefs, together with Tribal Legislative Representatives, believe MITSC should take in the event of future disputes that relate to fundamental differences of interpretation of the Settlement Act. It also would be helpful for MITSC to know whether these elected officials agree that MITSC should perform the side-by-side analysis described above and whether there are issues they think should be included or not included.

C. Civil Law Review Proposals

Resolves 1997, Chapter 45, directed MITSC to undertake a systematic review of the civil laws of the State of Maine over a period of four years to determine their impact on the Wabanaki. MITSC is preparing its final report pursuant to the resolve, which is due on December 15, 2000. It would be helpful to know whether the Governors, Chiefs, and Tribal Legislative Representatives agree with the following recommendations, which MITSC is planning to include in its report:

- ⇒ Create a new legislative mechanism for addressing tribal and tribal-state issues at the Legislature (e.g. a Joint Standing Committee on Indian Affairs, a Subcommittee of Judiciary Committee, etc.)
- ⇒ Allow MITSC to introduce legislation on an ongoing basis. MITSC has been allowed to do this when submitting reports pursuant to the resolve.
- ⇒ Require MITSC to submit biennial reports to the Legislature and Tribal Councils. MITSC believes that such a formal requirement will help strengthen its connection to the Legislature and the Tribal Councils.

D. Education Initiatives

MITSC would like to know whether the Governors, Chiefs, and Tribal Legislative Representatives support the direction and initiatives in the draft work plan that is included in Attachment 3. Among these proposed activities to educate non-native people about the Wabanaki are the following:

- ⇒ Working on the Wabanaki curriculum legislation proposed by Penobscot Legislative Representative Donna Loring;
- ⇒ Holding a conference for teachers on how to teach about the Wabanaki;
- ⇒ Organizing Wabanaki Day (or week) in May;
- ⇒ Creating a MITSC Website;
- ⇒ Supporting a Maine Indian Claims Settlement Archives; and
- ⇒ Securing resources and support for various education initiatives.

E. Maliseet Legislation

If there are renewed efforts to bring the Houlton Band of Maliseets into the Settlement Act on similar terms as the Passamaquoddy Tribe and the Penobscot Nation, MITSC stands ready to help, if requested.

F. New Fishing Rules

As mentioned in Section 5-E, the Penobscot Nation has asked MITSC to adopt new rules to require licenses for commercial fishing on waters under MITSC's jurisdiction. MITSC plans to move forward on the new rules during 2001.

G. Continuation of \$15,000 in State Funding

As explained in Section 2-C, MITSC's state appropriation will decrease by \$15,000 in each year of the upcoming biennium unless the State appropriates this amount on a permanent basis. MITSC operates on a part-time basis with an annual income of just under \$62,000 from the State and the Tribes. The loss of \$15,000 would be a major setback, especially if there is agreement that MITSC should continue to play a substantial role in tribal-state relations.

Draft Questions to be Addressed in Side-by-Side Analysis

1. Should the treaty be interpreted in accordance with federal Indian common law? Or is this a unique relationship that should be interpreted in accordance state law only?
2. What is the definition of the Penobscot Indian Reservation as set forth in §6203(8)?
 - 2a. Does Indian Territory extend to the thread of the river? To the shore? Does it include the whole riverbed?
3. What is the definition of the Passamaquoddy Indian Reservation as set forth in §6203(5)?
 - 3a. Does the Passamaquoddy Tribe have control over salt water bodies that lie within their reservation?
4. Does “transfer” in §6203(13) apply to land within the reservations? Can it diminish what is within the historic reservations?
5. What is the meaning of §6206 regarding the Tribes having the powers and obligations of a municipality except for internal tribal matters? What is the relationship between the Tribes and the State defined by this language? To what degree does the language limit and to what degree does it expand the powers of the Tribes? What does “internal tribal matters” mean?
6. What is the role of the Federal Government in its trust relationship vis-a-vis the State?
7. What are sustenance fishing rights as defined in §6207(4)? What is included in this right? What is sustenance? Does the right include a right to control quality as well as quantity of the fish?
8. Who has the power to control the surface use of waters within the reservations and Indian Territory?
9. Is there a difference in the extent of jurisdiction of Tribes over their waters located in their trust lands and waters that are part of their reservations?
10. What is “business capacity” and what is “governmental capacity” under 6208(3), for example in relation to taxation issues?

Related Questions:

1. There is a concern about precedent: If the Tribes or the State engage in dialogue about these issues for MITSC, could that information be quoted in court by the other side? Can we created a protected forum for these discussions so that could not happen?
2. Do MITSC's by-laws and procedures need to be amended? Should specific under-standings about what can and cannot be done with minority positions be included? Would doing so prevent a repeat of the problems encountered this past spring?
3. Do questions 1-10 affect the integrity of the Wabanaki culture? If yes, how?
Note: During MITSC s 8/21/00 meeting, John Banks suggested that the analysis should look at the whether the questions affect cultural integrity.

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- i. Letter by MITSC to Judiciary Committee about LD 2607
 - ii. Letter by State MITSC Members to Judiciary Committee about LD 26o7
 - iii. Draft Education Work Plan
 - iv. MITSC Letter about NPDES
 - v. Draft: Questions to be Addressed in the Side-by-Side Analysis